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## The Advisory Opinion and the United States Supreme Court

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for antecedent debts seems well calculated to encourage dealings on credit. Further, the new policy mirrors a general trend in the law from *caveat emptor* to *caveat dominus*.<sup>93</sup> The problem involves a delicate balance of security in title and security of purchase. Modern views inclined towards the maintenance of unhampered commercial intercourse favor the latter.

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THE ADVISORY OPINION AND THE UNITED STATES SUPREME COURT.—Perhaps no other American institution has been subjected to more bitter and incisive criticism,<sup>1</sup> and *e converso*, been defended with a greater abundance of encomiums and hosannas<sup>2</sup> than has the Supreme Court of the United States. Notwithstanding this sharp contrast in opinion, partisans of all factions, whether of the conservative or extremist varieties, appear to be reconciled on the fundamental reality of the role of that historic tribunal in shaping much of our present pattern and philosophy.<sup>3</sup> Consequently, any proposal relating to the discharge of that responsibility must, of necessity, touch upon the whole mechanism of our system, and is therefore particularly worthy of examination.

Shortly after the decision in the highly celebrated and much debated *Schechter Case*,<sup>4</sup> a number of resolutions proposing an amendment to the Constitution were introduced in the House of Representatives to enlarge the jurisdiction of the Court so as to enable it to act in an advisory capacity.<sup>5</sup> Seemingly moved by the two year spectacle of insecurity and uncertainty which attended the life of the N.I.R.A., and of the waste and confusion which resulted from its demise at the hands of a unanimous bench, the proponents of these resolutions visioned in this stratagem a means of avoiding repetition of that scene in the future

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93. HUSTON, ENFORCEMENT OF DECREES IN EQUITY (1915) 128; *cf.* Comment (1935) 4 FORDHAM L. REV. 295 (decline of *caveat emptor* in the sale of food).

1. RANSOME, OUR JUDICIAL OLIGARCHY (1912); ADAMS, THE THEORY OF SOCIAL REVOLUTIONS (1913); BOUDIN, GOVERNMENT BY JUDICIARY (1932).

2. GUTHRIE, THE FOURTEENTH AMENDMENT (1898) 29; WICKERSHAM, *The Judicial Function* (1912) 60 U. OF PA. L. REV. 601; BECK, THE CONSTITUTION OF THE UNITED STATES (1933) 231.

3. BEARD, AMERICAN GOVERNMENT AND POLITICS (1910) 314; 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (2d ed. 1928) vii; 2 *id.* at 753; BECK, *op. cit. supra* note 2; Lerner, *Supreme Court and American Capitalism* (1933) 42 YALE L. J. 668, 696; CORWIN, TWILIGHT OF THE SUPREME COURT (1934) 182; LASKI, THE STATE IN THEORY AND PRACTICE (1935) 156; Shephard, *Democracy in Transition* (1935) 29 AMER. POL. SCI. REV. 1.

4. A. L. A. *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935) (decided on May 27, 1935; the entire code structure was to expire on the succeeding June 16; see 48 STAT. 195, 196, 15 U. S. C. A. § 701 (c) [Supp. 1934]). See Comment (1935) 4 FORDHAM L. REV. 457.

5. On June 17, 1935, Congressman Tolan introduced a bill in the House of Representatives proposing an amendment to the Constitution whereby the "President or either House of Congress, at any time may require from the Supreme Court an opinion upon the constitutionality of any Act passed by Congress, and the Supreme Court shall render such opinion in writing." H. J. RES. 317, 74th Cong., 1st Sess. (1935). On July 9, Representative Maas offered an amendment declaring that no Act of Congress shall become a law unless

administration of the law.<sup>6</sup> On October 6, 1935, the issue was committed to the forum of public opinion when Governor Hoffman of New Jersey announced his advocacy of an amendment embodying many of the suggestions of his predecessors.<sup>7</sup> It is not at all improbable that these events augur the beginning of a new reform movement which is sure to be the subject of more intense agitation at the second session of Congress and with the advent of the 1936 presidential campaign.<sup>8</sup>

It is a commonplace of current constitutional doctrine that the rendition of an advisory opinion is anathema to the Supreme Court.<sup>9</sup> It is necessary at the outset, therefore, to distinguish the general features of that vilified proce-

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presented by the President to the Supreme Court for its decision on the constitutionality thereof and "it shall be the duty of the Supreme Court to render such decision within sixty days." H. J. RES. 344, 74th Cong., 1st Sess. (1935). A third version was embodied in the proposal of Representative Hobbs which required the Supreme Court "to render an advisory opinion upon the constitutionality of Acts of Congress whenever so requested by the President, or by at least one third of each of the Houses of Congress," such request to be considered a preferred case on the Court's calendar. H. J. RES. 374, 74th Cong., 1st Sess. (1935):

6. See Remarks in the House, 79 Cong. Rec., July 9, 1935, at 11292. That there is no little ferment in the Senate upon the subject is indicated by the proposal of Senator Norris on June 17, requiring a two-thirds vote to validate judicial review of federal legislation with the proviso that no judgment be rendered unless action is commenced within six months after the enactment of the law. S. J. RES. 149, 74th Cong., 1st Sess. (1935). Witness also the bill introduced by Senator La Follette on July 8, permitting any decision of an inferior federal court upon the constitutionality of a federal statute to be taken directly to the Supreme Court and advanced on its docket if the Attorney-General certifies that the "national public interest" justifies such review. S. 3211, 74th Cong., 1st Sess. (1935). See U. S. Law Week, July 16, 1935, at 1038, pointing out that the La Follette plan fails to assure expedition of such cases in their appellate stages and that the accelerating features of the proposal depend entirely on the discretion of the Attorney-General. *Cf.* the suggestion of James M. Beck, favoring the creation of a quasi-judicial commission of eminent lawyers to advise the legislature on the validity of proposed laws. U. S. Law Week, July 23, 1935, at 1059.

7. In an open letter to the Chairman of the National Republican Committee, Governor Hoffman made the proposal that the party include in its platform an amendment to the Constitution to the effect that "all laws enacted by the Congress and approved by the President, or enacted by the Congress over the disapproval of the President, shall be submitted to the Supreme Court of the United States for a decision as to their constitutionality before they become effective." The reasons expressed in support of the proposal have a somewhat narrower scope than those of the Congressmen in that the Governor, moved by an antipathy to the policies of the Roosevelt administration, advances the amendment purely as a means of preventing the infiltration of allegedly socialistic practices into the present system. N. Y. Herald-Tribune, Oct. 7, 1935, at 16.

8. See editorial in N. Y. Herald-Tribune, Oct. 7, 1935, at 22 (unfavorable); *id.*, Oct. 23, 1935, at 18 (letter of Hoffman in reply and editorial comment thereon); N. Y. Times, Oct. 8, 1935, at 22 (unfavorable editorial); *id.*, Oct. 12, 1935, at 16 (unfavorable letter); *id.*, Oct. 27, 1935, § 4, at 9 (unfavorable letter); *id.*, Nov. 3, 1935, § 4, at 9 (favorable letter); N. Y. L. J. Nov. 1, 1935, at 1614 (unfavorable editorial).

9. *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70 (1927) is generally regarded as authority for the Court's extreme sensitiveness to the assumption of duties even remotely advisory. "The judgment is not merely advisory as in *Liberty Warehouse Co. v. Grannis*. . . ." *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123, 134 (1927).

ture from the conditioning elements of related types of proceedings. The advisory opinion is an anticipatory opinion, given in advance of actual litigation, at the behest of another organ of the government, relating to the validity of action contemplated or already taken by such authority and is delivered by the court, or by the judges *ad seriatim*.<sup>10</sup> As a consequence of the unqualified disapproval by the Court of any appeal suggesting the exercise of such a function,<sup>11</sup> the term has developed a wider and different import. It has been used indiscriminately<sup>12</sup> to describe nearly every type of proceeding denominated by the Court as non-justiciable and not within the limits of its jurisdiction as circumscribed by the Constitution.<sup>13</sup> In a broad sense, the advisory opinion, like the declaratory judgment, is designed to increase the scope of preventive justice in the American legal system,<sup>14</sup> to obviate to some degree the necessity for social conflict inherent in the requirement that legal injuries shall precede appeal to the courts. Its purpose is purely diagnostic and ameliorative, and involves no coercive relief.<sup>15</sup> Unlike the declaratory judgment, it has no binding force other than the persuasive character of its reasoning.<sup>16</sup>

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10. 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 99; 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 28; 3 *id.* at 1628.

11. See note 9, *supra*.

12. The Supreme Court in several since discredited *dicta*, has referred to the declaratory judgment as if it constituted an advisory opinion and the confusion thus created postponed for a considerable time the enactment of a federal declaratory judgment statute [48 STAT. 955, 28 U. S. C. A. § 400 (1934)]. See BORCHARD, DECLARATORY JUDGMENTS (1934) 50.

13. "The judicial power [of the United States] shall extend to all cases . . . controversies. . . ." U. S. CONST. Art. III, § 2. (Italics supplied.) See notes 85-90, *infra*. Federal jurisdiction must appear affirmatively on the record, or its existence will be challenged by the Court on its own motion. *Mansfield, C. & L. M. Ry. v. Swan*, 111 U. S. 379 (1884).

14. Hudson, *Advisory Opinions of National and International Courts* (1924) 37 HARV. L. REV. 970, 971-972; Clovis and Updegraff, *Advisory Opinions* (1928) 13 IOWA L. REV. 188, 198. A provision of the Uniform Declaratory Judgments Act permits the enforceability and constitutionality of statutes to be attacked by declaratory action. Professor Borchard has observed that construction and interpretation are a more common quest of such statutory proceedings and that validity has been challenged for the most part only in taxation cases. BORCHARD, DECLARATORY JUDGMENTS (1934) 552, 560. The scope of the federal act in this respect is at present being tested in the suit brought by the state of Georgia asking for a declaratory judgment restraining the enforcement of the Bankhead Cotton Control Act. See U. S. Law Week, Nov. 19, 1935, at 193. The federal act is specifically limited to cases of "actual controversy" between adverse litigants, which would seem to be fixing the line of demarcation with sufficient clarity between the declaratory judgment and the advisory opinion. *Cf. Henrietta Mills v. Hoey*, 12 F. Supp. 61 (S. D. N. Y. 1935) (bill in district court seeking declaratory judgment that A.A.A. was unconstitutional dismissed under amendment to federal Declaratory Judgment Act withdrawing the remedy from controversies relative to federal taxation).

15. The declaratory judgment conclusively declares the preexisting rights of litigants but prescribes no coercive measures for their enforcement. BORCHARD, DECLARATORY JUDGMENTS (1934) vii. That the award of process or execution to carry a judgment into effect is not indispensable to a proper exercise of the judicial function is well established. See *Nashville, Chattanooga and St. Louis Ry. Co. v. Wallace*, 288 U. S. 249, 263 (1933).

16. Where not judicial precedent, the opinion is merely persuasive evidence of the application of the law to the matters embraced in the question. *In re Opinion of the Justices*, 214 Mass. 602, 102 N. E. 644 (1913). Naturally, if because of the excellence of

*Comparative History*

The advisory opinion in England owes its existence to the historical relation of the English judges to the Crown and the House of Lords.<sup>17</sup> The spectacular Coke is known to have been hostile to the practice of consulting the judiciary,<sup>18</sup> and his attitude may fairly be described as typical of a majority of the bench then and now.<sup>19</sup> As early as 1760, it was announced that such extra-judicial opinions would not be binding in later litigation.<sup>20</sup> Attempts to extend the practice of references to the High Court for advice have been frustrated by the unfriendly attitude of the judges.<sup>21</sup> In Canada, the practice of requiring extra-judicial opinions at first encountered opposition, but it has won its way and authority of considerable latitude has recently been conferred by statute

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the opinion, great weight is accorded it in later litigation, that would seem to be not a defect of the system but some indication of its efficacy as a form of preventive justice. That an advisory opinion does constitute judicial precedent has been held in Colorado, *In re Senate Resolution Relating to Senate Bill No. 65*, 9 Colo. 639, 21 Pac. 478 (1889); and in Maine, *Answer of the Justices*, 70 Me. 570, 583 (1880). But see *State v. Cleveland*, 58 Me. 564, 573 (1870) *semble*; *Opinion of the Justices*, 72 Me. 542, 562 (1881) *semble*.

It is significant to note that the proposals referred to in notes 5 and 7, *supra*, are addressed to laws already passed by Congress. An advisory opinion rendered under such circumstances would no doubt be accorded the same force and effect as are the present decisions of the Court. Nevertheless, in giving such opinions, the Court would clearly be acting as the constitutional advisers of the other departments of the government. It would be deciding questions of validity anterior to the operation of the statutes with a view to notifying the government as to the propriety of contemplated action. For reasons set forth *infra*, the present writer is in sympathy with this form of the advisory opinion in the federal system. To deny the opinion the dignity of a decision in the unique milieu of Congress, the Constitution and the Supreme Court would give it a dubious effectiveness as a sedative and fail entirely of accomplishing the very objectives which give rise to it. The alternative scheme whereby the opinion would not be obligatory upon the petitioners and hence not binding on the Court, might appeal to those who, like Professor Llewellyn, seek a procedure under which rulings on unconstitutionality may be subjected to periodic reexamination. See Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1, 37. While the presumption of past infallibility should not be a conclusive one, nevertheless, exposing it through the medium of an advisory opinion to constant challenge at irregular intervals, would greatly complicate the status of the presumption in a given case and only weaken that measure of certainty which it is the primary function of a legal system to secure.

17. Since the English King was regarded as the source of all justice, the evolution of the national courts from the *curia regis* in no way deprived the sovereign of his power, when acting in his judicial capacity, to consult the judges. As a consequence, the Privy Council, to which the monarch's power came to be delegated, likewise consulted the judges. In 1833, Parliament created the present Judicial Committee of the Privy Council (3 & 4 WM. IV, c. 41), and the duty was conferred upon that body of advising the Crown on legal questions. Frankfurter, *Advisory Opinions* (1930) 1 ENCYC. SOC. SCI. 475, 476. For a more thorough description of the process, see Veeder, *Advisory Opinions of the Judges of England* (1900) 13 HARV. L. REV. 358; Wade, *Consultation of the Judiciary by the Executive* (1930) 46 L. Q. REV. 169.

18. 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1927) 428, n. 1, 438.

19. *Id.* at 351, 352.

20. Sackville's Case, 2 Eden 371, 28 Eng. Reprints 940 (Ch. 1760).

21. PARLIAMENTARY DEBATES, 5th Series, Vol. lxx, 755, 795, 914 (1928).

on the Governor-General and each house of Parliament in this regard.<sup>22</sup> Australia has rejected the device as repugnant to its constitution which is largely modeled on that of the United States.<sup>23</sup> The constitutions of several Latin-American countries, notably those of Colombia<sup>24</sup> and Panama,<sup>25</sup> provide for judicial participation in the legislative process, and in particular for references of legal questions to the courts.<sup>26</sup> The plastic nature of the advisory opinion has proved itself unusually adaptable to the exigencies of international disputes and has served on numerous occasions as an effective instrument of arbitration in the Permanent Court of International Justice.<sup>27</sup>

The advisory opinion was formally introduced into the American constitutional system by the Massachusetts Constitution of 1780.<sup>28</sup> Before that time there had existed in New York, under the Constitution of 1777, a Council of Revision, consisting of the Governor, the Chancellor, and the judges of the Supreme Court, which exercised a veto power over bills passed by the legislature.<sup>29</sup> The first state to follow the precedent of Massachusetts was New Hampshire, which incorporated in its constitution a provision identical in all respects with that of its predecessor.<sup>30</sup> Advisory opinions have also been provided for in the constitutions of Maine,<sup>31</sup> Rhode Island,<sup>32</sup> Florida,<sup>33</sup> Colorado,<sup>34</sup> and South Dakota.<sup>35</sup> The second Missouri constitution adopted the device in 1865,<sup>36</sup> but it had an ineffective history<sup>37</sup> and was abandoned by constitutional revision

22. CANADA REV. STAT. (1927) c. 35, §§ 55, 56; see Attorney General for Ontario v. Attorney General for Canada, [1912] A. C. 571, 585, 586.

23. Luna Park, Ltd. v. Commonwealth of Australia, 32 Comm. L. R. 596 (1923).

24. COLUMBIA CONST. (1886) art. 90.

25. PANAMA CONST. (1904) art. 105.

26. 1 RODRIGUEZ, AMERICAN CONSTITUTIONS (1907) 278, 313, 375, 415; 2 *id.* 336, 337.

27. Hammarskjöld, *The Early Work of the Permanent Court of International Justice* (1923) 36 HARV. L. REV. 704, 715; Hudson, *Advisory Opinions of National and International Courts* (1924) 37 HARV. L. REV. 970, 992, 999.

28. MASS. CONST. (1780) pt. 2, c. 3, art. 2 (requiring opinions on "important questions of law and upon solemn occasions" when called for by the Governor, or either house of the legislature). The provision has survived two efforts to secure its repeal, once in 1820, and again in 1853. The first opinion was rendered in 1781. Prior to 1780, there had been a few instances of irregular solicitation of judicial advice. See ELLINGWOOD, *DEPARTMENTAL COOPERATION IN STATE GOVERNMENT* (1918) 30 *et seq.*

29. This procedure lasted until 1817. During the forty years of its practice, of the 6,590 bills passed by the legislature, only 128 were rejected. BALDWIN, *THE AMERICAN JUDICIARY* (1905) 30.

30. N. H. CONST. (1784) pt. 2, art. 74.

31. ME. CONST. (1820) art. 6, § 3 (substantially like that of Massachusetts and New Hampshire).

32. R. I. CONST. (1842) art. 10, § 2 (Governor or either house of legislature may call for opinions on "any question of law").

33. FLA. CONST. (1868) art. 5, § 16 (privilege of obtaining advisory opinions awarded only to the executive branch).

34. COLO. CONST. (1886) art. 6, § 3 (Governor or either house of legislature may request opinions "upon important questions upon solemn occasions").

35. S. D. CONST. (1889) art. 5, § 13 (similar to the Florida provision).

36. MO. CONST. (1865) art. 6, § 11.

37. See Hudson, *Advisory Opinions of National and International Courts* (1924) 37

in 1875.<sup>38</sup> Different versions of the expediency and desirability of the practice are reflected in the statutory enactments of Vermont,<sup>39</sup> Delaware,<sup>40</sup> and Alabama.<sup>41</sup> A Minnesota act<sup>42</sup> conferring advisory functions on the highest court of the state was held unconstitutional in 1865.<sup>43</sup> In Connecticut<sup>44</sup> and Ohio,<sup>45</sup> the judges have adhered to constitutional limitations and refused to give opinions when requested by the legislature. The power to act in an advisory capacity under any circumstances has been explicitly denied in North Carolina,<sup>46</sup> Nebraska,<sup>47</sup> and New York.<sup>48</sup> There is an interesting incident in an old Pennsylvania report in which the court delivered a voluminous opinion on stated questions at the request of the legislature, although there was no constitutional or statutory provision authorizing such request.<sup>49</sup>

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HARV. L. REV. 970, 978-982, for discussion of the inadequate test accorded the device in Missouri.

38. ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT (1918) 46. Cf. IDAHO CONST. (1890) art. 5, § 25 (requiring the judges of the highest court to report annually to the Governor defects in existing laws).

39. VT. PUB. LAWS (1934) § 8886. (privilege conferred on the Governor and restricted to questions relating only to the discharge of his duties).

40. DEL. REV. CODE (1915) c. 13, § 402 (Governor may at any time request an opinion regarding the proper construction of state or federal constitution or of any state law).

41. ALA. CODE ANN. (Michie, 1928) §§ 10290, 10291, 10292 (of wide scope, extending the privilege to both the Governor and either house of the legislature). The statute was invoked immediately after its enactment and its constitutionality was upheld by a divided court. *In re* Opinions of the Justices, 209 Ala. 593, 96 So. 487 (1923). Cf. OKLA. STAT. ANN. (Harlow, 1931) §§ 3171, 3172 (Governor may require opinion of judges of Criminal Court of Appeals upon statements of conviction with sentence of death required by law to be transmitted to him). Such an advisory opinion, of course, is not directed at the prevention of unconstitutional legislation or unlawful executive action, but is designed to insure the accused the full benefits of gubernatorial discretion. New York has had a similar statute since 1829. See CODE CRIM. PROC. (1881) § 494 (formerly 2 REV. STAT. [1829] 658, §§ 13, 14). There seems to be but one instance in which the statute was formally invoked. *People v. Green*, 1 Den. 614 (N. Y. 1845). And see (1890) 4 HARV. L. REV. 37.

42. MINN. PUB. STAT. (Sherburne & Holmstead, 1859) c. 4, § 15.

43. In the Matter of the Application of the Senate, 10 Minn. 78 (1865) (rejection based on doctrine of separation of powers); *Rice v. Austin*, 19 Minn. 103 (1872) (court likewise refused to answer questions submitted by the Governor).

44. Reply of the Judges, 33 Conn. 586 (1867).

45. *State v. Baughman*, 38 Ohio St. 455 (1882); cf. *Foster v. Com'rs. of Wood County*, 9 Ohio St. 540 (1859).

46. Opinions of the Justices, 64 N. C. 792 (1870) *semble*.

47. In Nebraska, the advisory opinion was long in vogue without either constitutional or statutory sanction until the highest court of the state adopted a rule that it would consider only matters in actual litigation. See 6 AMER. & ENGL. ENCYC. LAW (2d ed. 1898) 1068.

48. *Self-Insurers' Ass'n. v. State Ind. Comm.*, 224 N. Y. 13, 119 N. E. 1027 (1918) (power of Commission to certify questions of law to the Appellate Division held to include only such as were involved in an actual controversy and not to authorize the submission of questions merely seeking enlightenment with respect to the Commission's duties). Cf. note 41, *supra*.

49. Report of the Judges, 3 Binn. 595 (Pa. 1808) (lengthy and learned report rendered at the request of both houses of the legislature advising as to the incorporation of certain

A survey of the leading cases in the various state jurisdictions indicates a tendency to contract the scope of the duty and to condition the propriety of its performance upon certain well-defined principles.<sup>50</sup> There is no absolute obligation to answer the questions submitted if, in the exercise of its discretion, the court finds the inquiry without the scope of its duty.<sup>51</sup> The question must be *publici juris*,<sup>52</sup> and must neither involve nor directly affect private rights or interests.<sup>53</sup> The reference must not embrace any issue of fact.<sup>54</sup> When the question seeks an exposition of certain provisions of the constitution, it must relate to definite legislation then pending,<sup>55</sup> and such reference must not be a veiled attempt to elicit views as to the sufficiency or wisdom of such legislation.<sup>56</sup> In Massachusetts, it has been stated that the questions proposed need not be such as might possibly have come before the court when acting

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English statutes into the laws of the Commonwealth). *Cf.* Opinion of the Judges, 79 Ky. 621 (1881) (opinion given without requirement of law as to the power of the Governor to fill a vacancy in the Supreme Court of the state). In Illinois, it was once intimated that an advisory opinion would be given if desired. See *People v. Bissell*, 19 Ill. 229, 233, 234 (1857).

50. Under the Florida constitution, the scope of the privilege conferred has been further diminished by a holding that a duty with respect to a bill before it becomes a law is not an executive duty as to which the judges can advise. Opinion of the Justices, 23 Fla. 297, 6 So. 925 (1887). In fact, it would seem that in Florida the judges are not empowered to advise as to the construction of statutes at any time. Advisory Opinion to Governor, 50 Fla. 169, 39 So. 187 (1905); *In re* Opinions of the Justices, 69 Fla. 632, 68 So. 851 (1915); *cf. Re Constitutional Provision*, 3 S. D. 548, 54 N. W. 650 (1893).

51. *In re* Lieutenant-Governorship, 54 Colo. 166, 129 Pac. 811 (1913); Opinions of the Justices, 95 Me. 564, 51 Atl. 224 (1901) (majority of court refused to answer, a minority of three replying on the ground that the constitutional provision was mandatory); Opinion of the Justices, 148 Mass. 623, 21 N. E. 439 (1889). It is interesting to observe that under Canadian practice an answer is mandatory in that the questions are conclusively deemed worthy of response. See Frankfurter, *Advisory Opinions* (1930) 1 ENCYC. SOC. SCI. 475, 477.

52. *In re* Lieutenant-Governorship, 54 Colo. 166, 129 Pac. 811 (1913); Answer of the Justices, 122 Mass. 600 (1877); Opinion of the Justices, 3 R. I. 299 (1854).

53. *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181 (1899); *In re* Senate Bill No. 27, 28 Colo. 359, 65 Pac. 50 (1901); Opinion of the Justices, 62 N. H. 704 (1877); *In re* Opinion of the Judges, 43 S. D. 645, 180 N. W. 64 (1920).

54. *Dinan v. Swig*, 223 Mass. 516, 112 N. E. 91 (1916); *In re* Opinion of the Justices, 76 N. H. 601, 81 Atl. 170 (1911).

55. *In re* Irrigation Resolution, 9 Colo. 620, 21 Pac. 470 (1886); *In re* Opinion of the Justices, 75 N. H. 624, 75 Atl. 99 (1910); *In re* Opinion of the Justices, 217 Mass. 607, 105 N. E. 440 (1914). This salutary rule is consistent with the purpose of the advisory opinion in these jurisdictions which is to prevent the passage of unconstitutional legislation, not to clear up moot and impractical questions of law. Hence, in Massachusetts and Colorado, opinions were refused on bills which had not taken definite form, or which had become law by reason of final passage. *In re* Senate Bill No. 416, 45 Colo. 394, 101 Pac. 410 (1909); *In re* Opinion of the Justices, 226 Mass. 607, 115 N. E. 921 (1917). Also, in Colorado, when the question was covered by litigation then pending, the court refused to answer. *In re* Irrigation Resolution, *supra*.

56. Opinion of the Justices, 95 Me. 564, 51 Atl. 224 (1901); *In re* Opinion of the Justices, 76 N. H. 588, 79 Atl. 31 (1911).



in its formal judicial capacity.<sup>57</sup> In most<sup>58</sup> jurisdictions, the opinions rendered do not have the authority of decisions and are consequently accorded less weight in later litigation.<sup>59</sup>

The consensus of opinion of those authorities who have examined the operation of the device in the several states appears to be definitely favorable.<sup>60</sup>

### *Federal History*

The intermittent career of the advisory opinion in our national history finds explanation in the circumstances which have surrounded the development of our constitutional theory. The initial debate upon the subject occurred at the Constitutional Convention of 1787.<sup>61</sup> On June 4, the delegates deleted from Edmund Randolph's resolution dealing with the power to negative acts of the legislature, a provision for joining the judiciary with the Executive in exercising this right of veto.<sup>62</sup> The minority in favor of the plan displayed a certain tenacity of purpose and it was not until the proposal had been defeated on three subsequent occasions that it was ultimately abandoned.<sup>63</sup> On July 21, Gorham of Massachusetts, exhibiting the influence of the constitution of his state, suggested the adoption of a provision allowing the Executive to obtain

57. See Opinion of the Justices, 126 Mass. 557, 566 (1878) (opinion is particularly useful for its thorough history of the English background of the device). However, the Massachusetts provision has been specifically construed not to authorize the imposition upon the court of functions vested exclusively in other departments of the government. *Case of Supervisor of Elections*, 114 Mass. 247 (1873); *Boston v. Chelsea*, 212 Mass. 127, 98 N. E. 620 (1912).

58. Colorado seems to be the only exception. See note 16, *supra*.

59. *Green v. Commonwealth*, 94 Mass. 155 (1866); *Loring v. Young*, 239 Mass. 349, 132 N. E. 65 (1921) (both the majority and the dissent expressly denied the influence of previous advisory opinions as judicial precedents); *In re Opinion of the Justices*, 76 N. H. 597, 79 Atl. 490 (1911); *In re Opinion of the Justices*, 41 R. I. 209, 103 Atl. 513 (1918).

60. Dubuque, *Duty of Judges as Constitutional Advisers* (1890) 24 *AMER. L. REV.* 369; ELLINGWOOD, *DEPARTMENTAL COOPERATION IN STATE GOVERNMENT* (1918) *passim*; Clovis and Updegraff, *Advisory Opinions* (1928) 13 *IOWA L. REV.* 188; Hudson, *Advisory Opinions of National and International Courts* (1924) 37 *HARV. L. REV.* 970; Smith, *Advisory Opinions in North Carolina* (1929) 7 *N. C. L. REV.* 449. But see Frankfurter, *A Note on Advisory Opinions* (1924) 37 *HARV. L. REV.* 1002, 1006, 1008.

61. It must be remembered that the atmosphere surrounding that famous assembly was one of compromise induced by fear. Consistency of principle did not characterize the discussions at the Convention. Unity of action was achieved only by resort to concessions, the delegates appreciating the profound need for immediate consolidation of the Union to avoid incipient conflict and anarchy. WARREN, *THE MAKING OF THE CONSTITUTION* (1929) 54, 733, *et seq.*; BECK, *THE CONSTITUTION OF THE UNITED STATES* (1933) 52.

62. WARREN, *op. cit. supra* note 61, at 186. It is recorded that Jefferson, Wilson, Ellsworth, Madison, and Mason favored this provision, feeling that it would prevent legislative encroachments on the judicial power. WARREN, *op. cit. supra* note 61, at 332. The majority of the delegates, including Charles Pinckney, were opposed to it on the ground that the question of the constitutionality of an act of Congress passed over such veto might come up before the judiciary at a later date and that the judiciary ought not to enjoy the opportunity to pass twice on such act, once in a legislative or executive capacity, and once judicially. WARREN, *op. cit. supra* note 61, at 186.

63. *Ibid.*

advisory opinions from the Supreme Court.<sup>64</sup> There is no evidence of discussion upon this suggestion and the issue was suspended until August 20, when Charles Pinckney made a formal proposal to vest in "each branch of the legislature, as well as the Supreme Executive . . . authority to require the opinions of the Supreme Court upon important questions of law and upon solemn occasions."<sup>65</sup> The proposal was referred to the Committee on Detail, but never reported on by it nor revived by Pinckney.<sup>66</sup> History does not record the manoeuvrings and compromises which must have attended this abrupt termination of the issue.

In 1790, Hamilton, then Secretary of the Treasury, addressed a letter to Chief Justice Jay seeking the latter's opinion as to what action should be taken on certain resolutions recently passed by the House of Representatives of Virginia vigorously condemning projected federal legislation for the assumption of state debts and the redemption of the public debt. The evasive tone of Jay's cool and restrained reply foreshadowed his later position with regard to extra-judicial opinions.<sup>67</sup> On July 8, 1793, Washington, finding himself harassed by the strained international situation then existing,<sup>68</sup> acceded to the importunities of Jefferson,<sup>69</sup> and took the liberty of instructing that a letter be sent to Jay asking the justices whether the President might have the benefit of their advice on certain questions of law.<sup>70</sup> Finally,<sup>71</sup> on August 20, the Court answered through Jay, stating with due deference, but with firm conviction, their inability to assist the Executive in the matter without overstepping the limits of their duties as embodied in the Constitution.<sup>72</sup>

It is to be noted that this refusal was made in the face of an impression then prevalent in various quarters that the President had the right under the circumstances to require the advice of the Court.<sup>73</sup> Professor Thayer has commented that had the questions been of a different character or been proposed at a less tense moment, the justices might well have ventured their opinion and thus erected a precedent which would materially have altered the subsequent history of the device.<sup>74</sup>

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64. WARREN, *op. cit. supra* note 61, at 506.

65. WARREN, *op. cit. supra* note 61, at 505.

66. *Ibid.*

67. 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (2d ed. 1928) 52.

68. Considerable tension had been created by the Genet protest relating to the seizure by the Federal government of prizes taken by French privateers. See 1 WARREN, *op. cit. supra* note 67, at 108.

69. 1 WARREN, *op. cit. supra* note 67, 109. Hamilton had objected to this reference to the Court, although he had himself corresponded with Jay on a previous occasion and had in fact consulted personally with Jay on the same matter. Notwithstanding, he complied with Washington's request and framed the twenty-nine questions relating to international law and the construction of the French and British treaties. *Ibid.*

70. *Ibid.*

71. On July 20, a preliminary letter of reply was sent indicating the difficulty of determining the propriety of the request and the reluctance to decide the issue until certain colleagues had returned from circuit duties. 1 WARREN, *op. cit. supra* note 67, at 110.

72. *Ibid.*

73. 1 WARREN, *op. cit. supra* note 67, at 109.

74. THAYER, *LEGAL ESSAYS* (1908) 54.

An extraordinary incident occurred during the administration of Monroe.<sup>75</sup> On May 4, 1822, the President had vetoed a bill which sought to extend the federal power over turnpikes within the boundaries of the states, and he had embodied his views as to the limitations of the power involved in a lengthy pamphlet, a copy of which was transmitted to each of the justices. Marshall replied, expressing his agreement in general terms with the Executive.<sup>76</sup> Story answered but merely acknowledged receipt of Monroe's communication, without expressing any opinion on the question.<sup>77</sup> Shortly thereafter, it appears that Justice Johnson obtained the views of his associates and with their consent actually forwarded their joint opinion to the President.<sup>78</sup> Research does not disclose a single other instance in which the Court or the members thereof have acted in a similar informal capacity.

There is, however, one other occasion worthy of mention in which the justices of the Court did depart from their usual routine. The Hayes-Tilden election of 1876 had ended in such a way as to leave the result in doubt, and an Electoral Commission was created by act of Congress in 1877 with complete authority to decide the dispute which had arisen over the double returns involved. The roster of the Commission included five justices of the Supreme Court, four of whom were designated in the act, the choice of the fifth being left to the discretion of the four so specified.<sup>79</sup> Curiously, no objection was ever made by the Court to the duties thus conferred. It is a matter of record that every member of the Commission favored by his vote that view which would result in adding to the electoral vote of his party.<sup>80</sup> The reflection cast by such uncompromising loyalty upon the impartiality and integrity of the justices did not help the prestige of the Court.<sup>81</sup>

### *Supreme Court Decisions*

The policy of abstention from duties regarded as non-judicial in character has been frequently applied in formal litigation. The influence dominating this line of development appears to be the preconception of the Court as to the relative necessity of limiting the scope of judicial review so as to preserve intact the status of the judiciary as an independent organ of the federal government. It has therefore refused to act unless a case or controversy<sup>82</sup>

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75. "The incident is one of the most interesting and unusual in our political history." BIZZELL, *JUDICIAL INTERPRETATION OF POLITICAL THEORY* (1914) 115 *et seq.* ". . . it is safe to say that nothing of the sort could happen today." HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1928) 31.

76. 1 WARREN, *op. cit. supra* note 67, at 595.

77. 1 WARREN, *op. cit. supra* note 67, at 596.

78. *Ibid.*

79. The four justices designated by the act were Clifford, Field, Strong and Miller, the first two of whom were Democrats. The fifth justice chosen was Bradley, a Republican. STANWOOD, *A HISTORY OF PRESIDENTIAL ELECTIONS* (3d ed. 1892) 302, 337.

80. The entire committee included eight Republicans and seven Democrats. Hayes, the presidential candidate finally chosen, was Republican. STANWOOD, *op. cit. supra* note 79, at 342.

81. Beck, *The Supreme Court of the United States* (1925) 31 W. VA. L. Q. 139, 150.

82. According to one view, the words are used synonymously and have no relation to any limitation or extension of the class of questions to be adjudicated. See *King v. McClean*

cognizable by the judicial power<sup>83</sup> has been presented. In deciding upon the justiciability of the issues submitted, it has formulated the following criteria: *first*, that there be interested parties asserting adverse<sup>84</sup> rights or claims; *second*, that the element of finality attach to the decision rendered so that it be *res adjudicata* between the litigants; and *third*, that the relief sought in no way entail the performance of advisory duties by the Court.

The types of proceedings which have been dismissed for failure to satisfy the first criterion include fictitious suits,<sup>85</sup> anticipatory actions,<sup>86</sup> moot questions,<sup>87</sup> and cases involving insufficiency of complainant's interest.<sup>88</sup> The cases falling within the second category in which jurisdiction has been disclaimed have involved appeals from administrative findings in which the Court was reluctant to act because it appeared that its conclusion might be subject to

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Asylum, 64 Fed. 331, 336 (C. C. A. 1st, 1894). Another explanation is that "controversies" applies only to civil suits, while "cases" has a wider application so as to include criminal proceedings. *In re Pac. R. R. Com'rs.*, 32 Fed. 241, 255 (C. C. N. D. Cal. 1887). This latter view is cited with approval in *Muskraat v. United States*, 219 U. S. 346, 356 (1911).

83. According to *Gordon v. United States*, 117 U. S. 697, 706 (1864), judicial power merely embodies the meaning past experience had affixed to the term, and does not expound a new concept. One of the earliest definitions was given by Marshall when a member of the House of Representatives. "... a question must assume a legal form for forensic litigation and judicial decision. . . . There must be parties to come into court who can be reached by its process . . . whose rights admit of ultimate decision." 18 U. S. Appendix 16, 17 (1820). This conception was repeated by Marshall when Chief Justice in *Osborn v. United States Bank*, 22 U. S. 738, 819 (1824), and was later approved in *Smith v. Adams*, 130 U. S. 167, 173 (1889).

84. *Williams v. Hagood*, 98 U. S. 72 (1878). As a general rule, however, whether in actuality there is an antagonistic assertion of rights so that judicial intervention is imperative, is not determined abstractly but depends upon the existence of the other elements regarded as conditions precedent to the Court's power to act.

85. *Lord v. Veazie*, 49 U. S. 251 (1850) (pending appeal, one party to the suit acquired the other's interest); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339 (1892) (Court seemed to suspect parties of attempting to preclude inquiry into significant matters by submitting an agreed statement of facts). Cf. *Fletcher v. Peck*, 10 U. S. 87, 146 (1810); *Buchanan v. Warley*, 245 U. S. 60 (1917).

86. *Mayre v. Parsons*, 114 U. S. 325 (1884) (issue not yet ripe); *New Jersey v. Sargent*, 269 U. S. 328 (1926) (bill to enjoin enforcement of federal water power act dismissed for failure to show any project of state impeded, or right prejudicially affected by the operation of the federal statute). See criticism of latter case in Comment (1926) 35 YALE L. J. 867.

87. *Singer Mfg. Co. v. White*, 141 U. S. 696 (1891) (tax paid pending appeal seeking reversal of decree ordering payment); *Mills v. Green*, 159 U. S. 651 (1895) (suit to be registered as voter at election which had already been held); *United States v. Hamburg-American S. S. Co.*, 239 U. S. 466; *Atherton Mills v. Johnston*, 259 U. S. 13 (1922) (lapse of time brought minor whose employment was gravamen of the suit to an age not within the limits of the Child Labor Tax Act); *Barker Painting Co. v. Local No. 734*, 281 U. S. 462 (1930) (strike had ended and defendants had returned to work).

88. *Fairchild v. United States*, 258 U. S. 126 (1922) (plaintiffs, as members of organization disseminating information on constitutional law, sought to enjoin enforcement of 19th Amendment on ground of improper ratification); *Texas v. Interstate Commerce Comm.*, 258 U. S. 158 (1922) (persons directly affected by statute questioned by state not made parties to action; bill dismissed even though the citizenship of such necessary parties pre-

revision by an executive or legislative body.<sup>89</sup> In the third classification may be grouped those cases where the Court was disposed to regard any opinion it might render purely as informative to some other governmental authority.<sup>90</sup>

A somewhat different view of the fundamental premises underlying this deliberate contraction of the Court's jurisdiction is presented in the argument that courts, apart from constitutional limitations and in the final analysis, are forums for disputes rather than oracles of abstract declarations.<sup>91</sup> It is submitted that this emphasis upon the conventional role of the judiciary in any system of society has tended to divert attention from and underestimate the force of the doctrine of separation of powers. While this theory may be defensible in other respects as a useful generalization, its validity as a universal proposition applicable to all the facts is something less than self-evident.

The practice of asserting and denying rights for the purpose of constructing a test case is a common phenomenon, and has existed from the early days of the Court.<sup>92</sup> The test case, of course, does not contravene the requisite conditions of justiciability but the assumption of jurisdiction by the Court with knowledge of the intent with which such a suit is instituted, implies an appreciation of the fact that the essential relief being administered is not

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vented their being joined consistent with limitations of the Court's jurisdiction); *cf.* *Stearns v. Wood*, 236 U. S. 75 (1915); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Edward Hines' Trustees v. United States*, 263 U. S. 143 (1923). The interest required must be personal and not merely official. See *Marshall v. Dye*, 231 U. S. 250, 258 (1913) and cases cited therein; *cf.* *Florida v. Mellon*, 273 U. S. 12, 17, 18 (1927).

89. *Hayburn's Case*, 2 U. S. 408 (1792) (Court refused to act as a commission to investigate pension claims of war veterans under an act of Congress, it appearing that their decisions would be reviewable by the Secretary of War); *Sanborn v. United States*, 148 U. S. 222 (1893) (jurisdiction found lacking because no final judgment was obligatory on Department of Interior or enforceable by execution from any court).

90. *Muskat v. United States*, 219 U. S. 346 (1911) (Court declared appeal from Court of Claims was brought only to test constitutionality of Indian Land Act); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428 (1923) (Congress may vest performance of administrative and other extra-judicial duties in legislative, but not constitutional courts); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693 (1927) (Court will not review administrative proceedings of Court of Appeals of District of Columbia); *Federal Radio Comm. v. General Electric Co.*, 281 U. S. 464 (1930) (same); see *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74 (1927); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289 (1928).

91. See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Attempts* (1924) 37 HARV. L. REV. 1010, 1020. The theory that it is the characteristic of courts to decide and not to advise, that their work should be definitive and not consultative, is embodied in the constitutional principle that courts should decide constitutional questions only when absolutely necessary. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 338.

92. *Hylton v. United States*, 3 U. S. 171 (1796); *Wallace v. Adams*, 204 U. S. 415 (1907); *cf.* *Lord v. Veazie*, 49 U. S. 250, 254 (1850); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339 (1892) (Court declined jurisdiction of a friendly suit ostensibly on ground that it does not supervise legislative acts; real basis of decision is suggested in the Court's criticism of the agreed statement of facts submitted, which seemed to preclude inquiry into other facts essential to a proper determination of the case). The practice has become particularly prevalent with the advent of the New Deal, under which the appeal from legislation to adjudication has become almost a habit.

merely the disposition of the overt dispute but a declaration of the law which will be uniformly available to a host of potential litigants.<sup>93</sup>

Injunctions have frequently been allowed restraining the enforcement of statutes before any attempt to do so had been made.<sup>94</sup> By invoking the preventive jurisdiction of equity,<sup>95</sup> the petitioner is enabled to override the objection that the main purpose of the suit was to secure a declaration as to constitutionality.<sup>96</sup> Yet the fundamental fact is that the restraining order is not addressed to any transgression *in praesenti* but is distinctly intended to relieve from irreparable injury perceptible only *in futuro* as to which the Court is necessarily reasoning beyond the immediate facts and according to the logic of probabilities.<sup>97</sup>

A further significant exception that has been engrafted upon the traditional formula of judicial action is the fact that Congress can confer administrative duties on legislative courts.<sup>98</sup> The immunity of courts created under and by Article III from the imposition of such duties in no way detracts from the purely extra-judicial capacity in which the former type of court operates. True it is that the findings of such courts are without force as judicial pre-

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93. A similar departure from orthodox canons may be pointed out in certain cases where the element of conflict or hostility between the parties, the most common attribute of a dispute or controversy, was not present before the Court, the defendant manifestly being interested in the same judgment as the plaintiff. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (1901); *Kentucky v. Indiana*, 281 U. S. 163 (1930). Another refinement is revealed in those cases in which the question of separation of powers was apparently not significantly involved, and the Court was accordingly less strict in applying its jurisdictional standards. *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447 (1894) (majority refused to entertain contention that statute would make circuit court of the United States a mere adjunct of an administrative body; three justices dissented, stating that the question of separation of powers was more sharply in issue); *Minnesota v. Hitchcock*, 185 U. S. 373 (1902) (Court was reluctant to decline jurisdiction and seemingly anxious to decide case on its merits).

94. *Ex parte Young*, 209 U. S. 123 (1908); *Truax v. Raich*, 239 U. S. 33 (1915); *Adams v. Tanner*, 244 U. S. 590 (1917). The case, however, must not be too patently a "made" case or it will be dismissed as collusive. *Wathen v. Jackson Oil Co.*, 235 U. S. 635 (1915); and see dissenting opinion of Brandeis, J., in *Pennsylvania v. West Virginia*, 262 U. S. 553, 605, 610 (1923).

95. 1 POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) § 112.

96. See *Ex parte Young*, 209 U. S. 123, 165 (1908).

97. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) (Court issued injunction against enforcement of Oregon statute which was not to become effective until 1926, on authority of *Truax v. Raich*, 239 U. S. 33 [1915]; actually, this had the effect of a declaratory judgment and seems to be an abuse of the injunctive remedy at this time); *cf.* *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (Court restricted scope of its inquiry to necessities of the immediate issue and deemed them not worthy of injunctive relief). It is not uncommon, however, for a judicial decision to determine in advance what future action will be a discharge of existing duties and liabilities. In this sense, its function seems strictly declaratory. See *People ex rel. Central Park N. & E. River R.R. Co. v. Willcox*, 194 N. Y. 383, 386, 87 N. E. 517, 517 (1909).

98. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428 (1923). And see *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123, 134 (1927); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289 (1928); *Ex parte Bakelite Corp.*, 279 U. S. 438, 454 (1929); *cf.* *O'Donoghue v. United States*, 289 U. S. 516 (1933) (dual power of Congress over the District

cedents,<sup>99</sup> but no amount of distinctions can obscure the fact that here again an authorized tribunal for the administration of justice is adjudicating not upon contested legal rights but is determining or declaring *in thesi* what the law is or has been.

There is an additional item of evidence which demonstrates beyond cavil that courts function in a capacity other than that of independent societal agencies which speak only to settle real disputes properly brought before them. In an illuminating article written by Professor Albertsworth,<sup>100</sup> realism exposes the flaws in a rigid conceptualism by offering unmistakeable evidence of the actual performance of advisory functions by the Supreme Court, albeit through machinery of its own choosing. Attention is first directed to the effect any negative decision of the Court upon a given law has upon the subsequent amendment or complete repeal of the same by the legislature.<sup>101</sup> Primarily, however, the author has in mind a different sphere of influence. A systematic analysis of selected data is presented which reveals three important lines of development by which the Court has elaborated this quasi-advisory technique. *First*, through the innuendo of dicta, the Court has advised as to the correction of future legislation, which when later presented in its desired form, has been sustained.<sup>102</sup> *Second*, where the legislature had not responded with sufficient alacrity to the advice thus given by the Court, a consistent policy of strict construction was followed to compel the legislature to act.<sup>103</sup> *Third*, inferences contained in numerous dissenting opinions as to the probable scope of future decisions have presaged the transmutation of such dissents into the majority view when appropriate cases subsequently arose.<sup>104</sup> The author concludes from his findings that such methods are too haphazard and uncertain to be governmentally or socially sound and recommends improved machinery for the direct rendition of advisory opinions by the Court.<sup>105</sup>

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of Columbia may authorize the vesting of non-judicial functions in the courts of the District, but their status is constitutional to the extent that Congress may not alter the tenure and compensation of the judges of these courts contrary to Article III); see Comment (1933) 22 GEO. L. J. 91; (1933) 47 HARV. L. REV. 133; (1933) 32 MICH. L. REV. 103.

99. See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227 (1908).

100. Albertsworth, *Advisory Functions in Federal Supreme Court* (1935) 23 GEO. L. J. 643. It is interesting to compare in this connection recent comment to the effect that the Court, in anticipation of future legislation, has of its own volition initiated the consideration of constitutional questions applicable thereto by deliberately widening the orbit of the immediate controversy before it. Powell, *Commerce, Pensions and Codes* (1935) 49 HARV. L. REV. 1, 14, 15, 16. The same phenomenon, though treated from a different point of view, is discussed in Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 102, 103.

101. ALBERTSWORTH, *loc. cit. supra* note 100, at 645.

102. ALBERTSWORTH, *loc. cit. supra* note 100, at 650-663.

103. ALBERTSWORTH, *loc. cit. supra* note 100, at 663-667.

104. ALBERTSWORTH, *loc. cit. supra* note 100, at 647-650.

105. ALBERTSWORTH, *loc. cit. supra* note 100, at 668. Specifically, it is suggested that the amendment can be drawn so as to allow the justices themselves to pass on the wisdom of rendering an opinion in a particular case depending on the degree of public importance they attach to the matter involved. Requests for an opinion could be confined only to those submitted through the President. At page 669, the author intimates the possibility that

*Professor Frankfurter's Argument*

There is one further argument which has been interposed against extending the advisory opinion to the federal system which rests on no particular application of the doctrines of constitutional theory. That is the "fact" argument of Professor Frankfurter.<sup>106</sup> It is, perhaps, the one which carries the greatest weight in that it does offer some estimate of the problematic value of the device in operation. The advisory opinion, it is said, would distort the entire focus of the judicial function in that it would require the Court to express its judgment on abortive issues without the benefit of all the relevant facts which, in crucial constitutional questions, are the very heart of the case.<sup>107</sup> In addition, the operation of the device would debilitate the creative responsibility of the legislature in that it would tend to induce reliance upon the judiciary, depriving the former of submitting its convictions to the test of trial and error and of accumulating new facts for the vindication of its judgment which, *a priori*, may run counter to settled legal principles.<sup>108</sup> Thus, an advisory opinion would move in an atmosphere of unreality and sterile isolation, divorced from the "impact of actuality and the intensity of immediacy."<sup>109</sup>

This argument presupposes in the first instance an emphasis upon facts over and above principles and prepossessions of justice which has never obtained in the decisions of the Court.<sup>110</sup> Further, it advances the questionable theory that the items of experience created by the operation of a statute are an integral

the Supreme Court may construe the present Federal Declaratory Judgment act in such a fashion as to meet the problem. This is extremely doubtful. See BORCHARD, *DECLARATORY JUDGMENTS* (1934) 32, 282; *cf.* *Henrietta Mills v. Hoey*, 12 F. Supp. 61 (S. D. N. Y. 1935), cited note 14, *supra*.

106. Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002.

107. FRANKFURTER, *loc. cit. supra* note 106, at 1003, 1004, 1006.

108. FRANKFURTER, *loc. cit. supra* note 106, at 1005.

109. FRANKFURTER, *loc. cit. supra* note 106, at 1006.

110. The present writer would be the last to deny Professor Frankfurter's luminous honesty and fine sincerity as to the significance of facts in a legal question. Another authority has aptly pointed out, however, the delusive exactness of facts and the dangers of an extreme empiricism. Kennedy, *Principles or Facts* (1935) 4 FORDHAM L. REV. 53. Clearly, legal concepts have no transcendental existence apart from the experience by which they are formulated, but facts are never observed without benefit of theory. Yntena, *The Implications of Legal Science* (1933) 10 N. Y. U. L. Q. REV. 279, 301. It is submitted that in the crucial cases to which Professor Frankfurter has reference, involving the broad guarantees and plenary powers contained in the Constitution, the issue was not one of fact but of social theories consciously or unconsciously assumed. It is doubtless true that the Court does not construe the Document from internal evidence of its meaning. It is its concept of the clause involved which is applied to the varied combinations of fact presented, and it is by virtue of such generalizations that it selects and weighs such data. COHEN, *LAW AND THE SOCIAL ORDER* (1933) 141, 142. The issue of the *Adkins* case was not determined by the fixed law prevailing over the undisputed facts, but by the majority's method of economic analysis and views of policy. Powell, *Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545, 572. From this standpoint, it is difficult to see in what sense the advisory opinion would operate to jeopardize the Court's customary approach to such cases, inasmuch as it would reduce possibly the quantity of specific facts involved but not the ultimate generic facts which seem to condition constitutionality.



part of the factual background upon which its validity may turn.<sup>111</sup> Also, it accepts the bitter partisanship which generally accompanies the present procedure of plaintiff against defendant as the most adequate method of facilitating that type of judicial inquiry which is occasioned when the processes or regulations of government are questioned.<sup>112</sup> Finally, it arbitrarily presumes that regardless of what safeguards are contrived, and no matter what form the device may take, it will inevitably reduce the present level of legislative initiative and morale.<sup>113</sup>

### *The Bogey of Politics*

The objection has also been raised that the advisory opinion would plunge

111. This theory is to be sharply distinguished from the perfectly legitimate concept by which a change in social and economic conditions may be properly urged in an inquiry into the constitutionality of a statute. See *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934); cf. *Nebbia v. New York*, 291 U. S. 502 (1934). What this theory urges is that the cumulative experience of the operation of a statute may settle the question of its validity. There is no evidence, of course, that the Court has ever delayed its decision until a statute has acquired significance as beneficial, successful or otherwise. What Professor Frankfurter is hinting at, presumably, is that such matters are done *sub silentio*. But see *McLean v. Arkansas*, 211 U. S. 539, 550, 551 (1909), where the Court evinces a decided disinclination to reason from facts arising subsequent to the statute. It has been succinctly stated that the "constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done." *Stuart v. Palmer*, 74 N. Y. 183, 188 (1878); cf. *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258, 269 (C. C. S. D. N. D. 1900); *Matter of Richardson*, 247 N. Y. 401, 420, 160 N. E. 655, 661 (1928).

112. The assumption that courts of law are more apt to apply rules of law soundly in an atmosphere of conflict has been the subject of no little criticism. COHEN, *LAW AND THE SOCIAL ORDER* (1933) 144; Arnold, *Trial by Combat and the New Deal* (1934) 47 HARV. L. REV. 913. Under the present procedure the responsibility of selecting the issues and the details of their presentation rests with the litigants. The approach of counsel is influenced primarily by solicitude for clients' interests and only incidentally with the values of the legislation involved. The hit-or-miss method of suits between individuals upon which a waiting industry may be depending for enlightenment certainly leaves much to be desired as a device for approving or disapproving governmental regulations. Under the advisory opinion procedure, the Court would be less hampered by the tensify of litigation and the contentiousness of adverse parties and freer to build its decision in conformity with the social and economic fabric of the times. In this connection, it is often stated that lack of argument and research by counsel before the Court would tend to result in ill-considered opinions. See N. Y. L. J., Nov. 1, 1935, at 1614. Section 3 of the Alabama Act (see note 41, *supra*) is the logical answer to this objection. It is provided therein that the justices "may request briefs from the Attorney-General and may receive briefs from other attorneys as *amici curiae*. . . ." A similar provision might well be included in a federal act so as to insure the adequate presentation of opposing points of view and pertinent information by interested counsel.

113. It seems paradoxical to assume that legislators are only politicians who will lose both the desire and the ability to abide by constitutional limitations if the outside agency which preserves these restrictions should venture to advise them as to their derelictions before they become effective. Even conceding the tendency of legislators to take the line of least resistance, the advisory opinion would seem to offer an excellent opportunity for raising the level of Congressional morality by the threat of its very proximity to legislative acts.

the Court into the arena of heated political controversies.<sup>114</sup> "Political" thus becomes, like "radical" a conveniently inclusive term of opprobrium, an *argumentum ad hominem* to be applied extrinsic to the merits of the proposal.<sup>115</sup> Clearly, there is no justification in labeling an issue political simply because it is the subject of debate in legislative chambers. The Court is constantly being obliged to answer questions upon which political, racial or class groups take divergent views, and its duty in that respect exists regardless of such controversies, which in fact have always attended important decisions on public law.<sup>116</sup> The most vulnerable part of this criticism is contained in its tacit inference that the Court is merely engaged in a process of unfolding the logical content of immutable legal concepts and is therefore demonstrating the legal Is and not any moral or ethical Ought. In addition to the fact that immunity from considerations of social policy does not obtain in the determinations of the Court,<sup>117</sup> such a theory further pays insufficient attention to the underlying pressures which are inseparable from the judiciary as a living organ of society irrespective of how far removed the decision may be from the deliberations of the legislature.<sup>118</sup>

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114. HALL, CONSTITUTIONAL LAW (1915) 49; Grinnell, *Supreme Court of the United States and the Advisory Opinion* (1924) 10 A. B. A. J. 522, 523; Beck, *The Supreme Court of the United States* (1925) 31 W. VA. L. Q. 139, 150; cf. HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 32; Shephard, *Democracy in Transition* (1935) 29 AM. POL. SCI. REV. 1, 17. That the advisory opinion will accentuate the pressure and impact of political issues upon the Court is an argument that cannot be buttressed by statistical proof. It is perhaps unfortunate that there are not available resistance-and-response charts of the individual justices with respect to such extra-legal considerations. That the members of the Court are human beings will be conceded even by their strongest critics. What it is difficult to perceive is that the human temptation to succumb to partisan politics will be increased by narrowing the gap between legislation and adjudication, which in some mystic way is supposed to mitigate the tortures of the judicial conscience. It is true that in the Hayes-Tilden affair (see notes 79 and 80, *supra*) the judges voted in strict conformity with their respective political affiliations. The incident, however, does not prove the tendency of politics to effect judicial irresponsibility. The judges were not acting in their capacity as members of the Court and were entirely unimpeded by the dictates of constitutionalism. That the criticism incurred by the individuals was deflected upon the collective body may be attributed only to the vagaries of public opinion.

115. The fallacies underlying this doctrine of the total depravity of man's political nature and the irrational prejudices for which that concept is responsible, are vigorously discussed in COHEN, LAW AND THE SOCIAL ORDER (1933) 13, 74, 150, 252.

116. A distinction should be drawn at this point between political *questions* and political *controversies*. The latter has reference only to practical politics and the swirl of immediate events. While the former has never been thoroughly defined, it would seem to include only such major issues as sovereignty and form of government upon which the Court has refused to decide in the interests of expediency. See *Luther v. Borden*, 48 U. S. 1 (1849); Weston, *Political Questions* (1925) 38 HARV. L. REV. 296.

117. The theory of "stainless objectivity" has been exploded in Kales, *The Inarticulate Major Premise* (1917) 26 YALE L. J. 519; Lerner, *The Supreme Court and American Capitalism* (1933) 42 YALE L. J. 668, 696; Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 842; cf. Laski, *Judicial Review of Social Policy in England* (1926) 39 HARV. L. REV. 832.

118. The Supreme Court, more than any other tribunal, is far from being a disembodied legal machine cut off from terrestrial human affairs. It is, itself, a composite of social pressures, using its representative judgment to balance those pressures to which it responds.

*Important Considerations*

The structure of modern society has created a highly complex problem of government.<sup>119</sup> In this milieu, it is becoming more and more apparent that the pronouncements of courts are "social events with social causes and consequences."<sup>120</sup> The present policy of the Court, upon whose vision in computing the meaning of the Constitution rests the ultimate significance and validity of legislative action, is *laissez faire* until the social equilibrium has been sufficiently disturbed by a collision of rights as to justify its mediation. The vindication of the vast network by which human conduct is regulated and governmental projects are directed is thereby subject to all the protracted delay and temporizing which are the inevitable incumbrances of procedural and jurisdictional formulae. The federal statute thus assumes a certain transitory and ephemeral aspect until the day of its final and formal disposition by the Court. During that interim, the doubt and uncertainty generated by this lack of permanence and substantiality may have hindered or entirely impeded much of the economic life of the nation. Both labor and capital are compelled to formulate their respective policies and activities at the risk of having their judgment belied by subsequent events. When the law is to this degree unascertainable and uncertain, its moral force is distinctly weakened.<sup>121</sup> On the other hand, the operation and enforcement of the statute may have occasioned complete and widespread reliance upon its wisdom and constitutionality. A negative<sup>122</sup> adjudication thereon immediately creates a penumbra of insecurity

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BENTLEY, *THE PROCESS OF GOVERNMENT* (1908) 393; MYERS, *THE SUPREME COURT OF THE UNITED STATES* (1912) *passim*. The advisory opinion neither curtails nor augments this aspect of the Court's functional pattern. The existence of such pressures, and their relative importance upon the Court, vary only with the importance of the questions before it.

119. Contemporary society is built upon the intricate economic structure of mass production and high finance. Under the impact of this fundamental circumstance, there has resulted a marked tendency toward state regulation, which it is futile to decry as regimentation. ELLIOTT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935) 128. The last two decades have witnessed floods of *ad hoc* legislation passed during recurrent crises under the multitudinous pressures exerted through innumerable class interests—legislation animated at its best by experimental theory or sporadic bursts of social consciousness, and at its worst inspired by the consideration of vote-getting. Yntema, *The Implications of Legal Science* (1933) 10 N. Y. U. L. Q. REV. 280, 281; cf. Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 107.

120. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 843.

121. The ineluctable truth of this fact was thus stated by Elihu Root: "The opinion that the law is unnecessarily uncertain and complex . . . and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions. It is unnecessary to emphasize here the danger from this general dissatisfaction. It breeds disrespect for law, and disrespect for law is the cornerstone of revolution." Remarks at the first dinner of the American Law Institute (1923) 1 PROCEEDINGS 89. See also KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW* (1930) 178, 179.

122. The number of cases in which acts of Congress have been held unconstitutional were comparatively few until recent times. With the increase in appeals from legislation to adjudication, negative holdings have become more frequent. See WARREN, *THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* (1925) 272 *et seq.*

and uncertainty all its own. The superstructure of conduct erected by conformity to its provisions at once loses whatever stability it once enjoyed and the adherents of an erstwhile binding law are now confronted with the painful problem of making the necessary readjustments.<sup>123</sup> The wastefulness and costliness of this whole scheme, which assumes staggering proportions when very important legislation is involved, *e.g.*, the N.I.R.A., cannot be overemphasized. It is the deliberate suspension of the note of finality which accounts for this atmosphere of confusion attending the administration of the law and which is becoming progressively more and more inept to solve the increasing social need of security, of assurance and certainty as to rights of person and property.

### Conclusion

More than any other consideration, the doctrine of separation of powers has dulled and hampered the effective realization of these facts. That doctrine was conceived as a precaution against tyranny through undue concentration of power in any of the three newly-created units of authority.<sup>124</sup> The radical pattern of self-government then demanded such a scheme. The independence that was conferred upon the judiciary merely indicated, not that the Fathers loved the Court more, but that the series of contacts with English rule had taught them to love the legislature less.<sup>125</sup> Despite the practical origin of the doctrine as a technique of coordinating ambitions and achieving collective harmony,<sup>126</sup> there has clustered around it a eulogistic flavor and an honorific

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123. Sometimes, as has been pointed out, "the egg cannot be unscrambled" and the statute, though interred with all due pomp and ceremony, has nevertheless left an indelible mark upon the life and destiny of the nation. The most striking example in American history was the law passed in 1820, known as the Missouri Compromise, which was acquiesced in by the people for thirty-seven years and finally destroyed in *Dred Scott v. Sanford*, 60 U. S. 393 (1857). It is not unreasonable to think that the terrible sequel of the decision might have been averted had the Supreme Court been able to determine the validity of that political settlement in advance of its enforcement. See BECK, *THE CONSTITUTION OF THE UNITED STATES* (1933) 226.

A more acute analysis is contained in the observations of Professor Corwin upon the spending power of Congress as tending to envelop the whole institution of judicial review in an atmosphere of futility. The neutral position of the Court has resulted in the performance of acts by the other branches of the government which, for many reasons, could not be challenged after their occurrence. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 149 *et seq.* And see *Massachusetts v. Mellon*, 262 U. S. 447, 487, 488 (1923) (bill to enjoin appropriations under the allegedly invalid Maternity Act of 1921 denied on the ground that the petitioner's interest as a taxpayer was insufficient to support the suit); *cf.* U. S. Law Week, July 23, 1935, at 1059 (pointing out the significance of this immunity with respect to the A. A. A. processing taxes, and the administrative expenses of the N. I. R. A.)

124. Sharp, *The Classical Doctrine of the Separation of Powers* (1935) 2 U. OF CHI. L. REV. 385, 386. It is important to note that the threefold division of powers is a necessary incident neither of a republican form of government, nor of due process of law. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908) (guaranties of the 14th Amendment do not include an observance of the doctrine of separation of powers); *cf.* HOBSON, *CIVILIZATION AND THE GROWTH OF THE LAW* (1935) 318.

125. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) 123.

126. Pound, *The Judicial Power* (1922) 35 HARV. L. REV. 787, 789. In all governments, separate organs are provided for the exercise of the several powers, the only difference be-

association which has tended to envelop it in a nimbus of ivory-tower inviolability. There are, no doubt, concrete virtues to a political system whereby one organ is vested with power to frustrate hasty and ill-considered attempts to solve exigent and vexatious problems though practically impotent to provide solutions of its own. Its limitations, however, cannot be ignored.<sup>127</sup> Some direct participation by the Court in the growing area of state responsibility has become imperative.<sup>128</sup>

The value of our Constitution—in fact, of any constitution—lies in its capacity for superimposing on new facts a continuity of purpose.<sup>129</sup> It is not, like the ark, too sacred to be touched. Attempts to modernize our constitutional system have been unsuccessful principally because of the pietism which is blind to all discovered faults and militantly opposed to any movement for reform.<sup>130</sup>

Necessity and fact have an erosive effect upon dogma and tradition.<sup>131</sup> Only the visionary will pretend that the advisory opinion is the panacea that will produce the long awaited millenium. There is, unfortunately, no alchemy by which one attempt to remove the archaic and obsolete will settle all similar problems.<sup>132</sup> Yet the words of Holmes are an impetus to action. "To rest

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tween them being with respect to the constitutional or legal status of these organs. Yet, the objective is the same in every case, for "the separation is organic and is motivated in the interest of varying concepts of efficiency and economy." WILLOUGHBY, *PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION* (1934) 11.

127. The practical demands of government have frequently precluded its jejune and doctrinaire application. *Dreyer v. Illinois*, 187 U. S. 71 (1902); *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320 (1910); *Intermountain Rate Cases*, 234 U. S. 476 (1914); *Maher v. Eby*, 264 U. S. 32 (1924). And see STOREY, *COMMENTARIES ON THE CONSTITUTION* (5th ed. 1891) 393; Comment (1921) 34 HARV. L. REV. 424; Pound, *The Judicial Power* (1922) 35 HARV. L. REV. 787. The doctrine can afford a still greater degree of flexibility without losing its essential value as a working basis upon which governmental machinery should be erected to cope with changing economic and social conditions. Clovis and Updegraff, *Advisory Opinions* (1928) 13 IOWA L. REV. 188, 196.

128. Arnold, *Trial by Combat and the New Deal* (1934) 47 HARV. L. REV. 913, 937. Cf. President Roosevelt's message to Congress: "... to make our economic and social structure capable of dealing with modern life is the joint task of the legislative, the judicial and the executive branches of the national government." N. Y. Times, Jan. 4, 1934, at 1.

129. Ascoli, *Realism Versus The Constitution* (1934) 1 SOCIAL RESEARCH 169, 179. It is necessary to emphasize that the Constitution is not a document but a living, working institution created as an instrument for the achievement of social ends. Over and above the language appearing in the text is a vast agglomerate of practices and doctrines which form the blueprint of the institutional structure. See Llewellyn, *The Constitution As An Institution* (1934) 34 COL. L. REV. 1.

130. Giddens, *Constitutional Amendments Proposed in the Seventy-Third Congress* (1935) 9 U. OF CIN. L. REV. 213, 241. Needless to say, tradition need not be disrupted for minutiae, nor should the Constitution be altered for light and transient causes. Machen, *The Elasticity of the Constitution* (1900) 14 HARV. L. REV. 200, 205. Yet, the attitude of sanctimonious reverence and exclusive devotion to the past is apt to impoverish our outlook on the present and make us forget that the law can be remoulded nearer to the heart's desire. COHEN, *LAW AND THE SOCIAL ORDER* (1933) vii.

131. See Loeb, *Fact and Fiction in Government* (1934) 28 AM. POL. SCI. REV. 1, for a discussion of some of the traditions which persist as anachronisms in modern society.

132. It may be well to mention at this point a few details worthy of consideration when,

upon a formula is a slumber that, prolonged, means death."<sup>133</sup> The added security and certainty afforded the operations of government commend the advisory opinion as an integral instrument of effective administration.

THE CONSTITUTIONALITY OF THE TENNESSEE VALLEY AUTHORITY.—The constitutionality of the elaborate and extensive power development program of the federal government<sup>1</sup> will be tested in the Supreme Court during the present term in so far as this program is embodied in the Tennessee Valley project. While the movement for developing the Tennessee River is not of recent origin,<sup>2</sup> the whole project as now conceived is a colossal experiment in regional planning,<sup>3</sup> particularly identified with the present administration and as characteristically "New Deal" as the N.I.R.A. Will it meet the same fate?<sup>4</sup>

as, and if the advisory opinion is introduced into federal jurisprudence. It is of primary importance that a reasonable time be allowed for a thorough disposition of the questions submitted. Also, some precaution will have to be taken against overwhelming the Court with minor and insignificant matters. These are problems of legislative draftsmanship, and there is no cause for believing that they cannot be properly and adequately handled in a carefully drawn amendment. The objection that in all events the work of the already overburdened Court will be greatly increased is more specious than substantial. It seems a logical assumption that the advisory opinion will prevent considerable litigation which now engages the attention of the Court by minimizing the number of unconstitutional laws, and that this curtailment of litigation will at least balance the added volume of advisory duties.

133. HOLMES, COLLECTED LEGAL PAPERS (1920) 306.

1. "Four great power areas are projected: (1) the Tennessee Valley in the southeast; (2) the Boulder Dam on the Colorado River in the southwest; (3) the Columbia River in the northwest; and (4) the St. Lawrence River in the northeast, the development of which requires a treaty between the federal government and the Dominion of Canada." Albertsworth, *Constitutional Issues of the Federal Power Program* (1935) 29 ILL. L. REV. 833, 841.

2. "Representative John R. Mitchell of Tennessee . . . during the debate on the Tennessee Valley Authority Act, pointed out that plans for controlling the flow of the Mississippi dated as far back as 1824, when the Secretary of War, John C. Calhoun, recommended a survey in the interest of what was then a matter of great national importance—inland waterway commerce. [77 CONG. REC. 2256 (1933)] . . . the matter was not seriously revived until the outbreak of the World War in 1914 . . . [when] the Federal government, as well as private munition makers in America, began to feel the pressure for the production of nitrates. . . . President Wilson secured the enactment by Congress . . . of the National Defense Act [39 STAT. 215 (1916), 50 U. S. C. A. § 79 (1926)]. The purpose of course, was primarily for the manufacture of synthetic nitrates [i.e., artificial extraction of nitrates from the atmosphere] in the interest of national defense . . . over \$100,000,000 was spent for the construction of Wilson Dam at Muscle Shoals, Ala., together with two subsidiary nitrate plants and minor incidental projects. . . . The War ended, however, before the project could be carried out. After a curtailment of the construction work on the Wilson Dam in 1921, it was decided to proceed with its completion, but no decision was reached as to the method of utilizing the power that would be developed until the passage of the Tennessee Valley Authority Act in 1933." Welch, *Constitutionality of the Tennessee Valley Project* (1935) 23 GEO. L. J. 389, 391.

3. One of its primary purposes is to conduct a large-scale experiment in regional economic and social planning. See Morgan, *Planning in the Tennessee Valley* (1933) 38 CUR. HIST. 663; Brown, *The Tennessee Valley Idea* (1934) 40 *id.* at 410; Morgan, *The Tennessee Valley Authority* (1934) 38 SCR. MO. 64.

4. The N.I.R.A. was declared unconstitutional, although on grounds which are not simi-